MOHD RAFI GULZAMAN

v.

PP

HIGH COURT MALAYA, SHAH ALAM
YEOH WEE SIAM JC
[CRIMINAL APPEAL NO: 42-35-2004]
11 SEPTEMBER 2009

CRIMINAL LAW: *Penal Code - Section 304 - Culpable homicide not amounting to murder - Appeal against conviction and sentence - Whether offence proved beyond reasonable doubt - Whether defence had raised any reasonable doubt on prosecution's case - Whether new judge taking over hearing at end of prosecution's case caused miscarriage of justice - Whether delay in trial judge supplying grounds of judgment caused miscarriage of justice - Whether conviction and sentence to be affirmed*

CRIMINAL LAW: *Penal Code - Sections 304 and 34 - Culpable homicide not amounting to murder - Common intention - Ingredients to be proven by prosecution - Inference of common intention from circumstantial evidence - Whether common intention to cause death or such bodily injury as is likely to cause death was proven*

CRIMINAL PROCEDURE: *Sentence - Culpable homicide not amounting to murder - Sentence to 12 years' imprisonment - Appeal against - Whether sentence manifestly excessive - Whether appellate intervention warranted - Penal Code, s. 304(a)*

EVIDENCE: *Witness - Credibility - Evidence given by sole prosecution witness - Whether discrepancies in witness' evidence material and fatal - Failure by prosecution to call more eye witnesses - Whether created serious doubt on prosecution's case*

On 11 February 1993, at about 7.20pm, SP4 *ie*, the nephew of the deceased saw the deceased quarreling with three men *ie*, Sabar, Atip and Chandran near a coffee shop. Sabar and Atip were the elder brothers of the appellant. Sabar, Atip and Chandran had brought parangs. So did the deceased. At the time of the quarrel, SP4 was together with the appellant, having a conversation, on a bridge nearby. Suddenly SP4 saw the appellant running towards the deceased, punch the deceased and then stab the deceased on his back with an object. The deceased passed away at the place of the incident. The appellant was charged under s. 304 read with s. 34 of the Penal Code (first limb) together with other persons still at

large. The appellant claimed trial. At the close of the case for the prosecution, the trial judge held that the prosecution had proven the case beyond reasonable doubt and called upon the appellant to enter his defence. According to the appellant he had gone to the spot after hearing that his elder brother was having a quarrel at the coffee shop. The appellant claimed that he tried to stop Atip and the deceased from fighting but Atip stabbed the deceased at his waist and slashed the deceased. The appellant denied stabbing the deceased. At the close of the case for the defence, the trial judge held that the defence had not raised any reasonable doubt on the prosecution's case. The trial judge accordingly found the appellant guilty as charged and sentenced him to 12 years' imprisonment. The appellant appealed against the conviction and sentence. The appellant, *inter alia*, claimed that: (i) the prosecution's sole eye-witness, SP4, was unreliable and wholly unworthy of credit; (ii) the learned trial judge had prejudiced the appellant by providing her grounds of judgment approximately two years after the conclusion of the defence case especially in the light of her hearing the case only from the defence stage; (iii) the learned trial judge misdirected herself seriously in law in failing to properly appreciate the defence of the appellant; (iv) the learned trial judge seriously misdirected herself in fact and law in concluding there was evidence of common intention as envisaged under s. 34 of the Penal Code; and (v) the learned trial judge misdirected herself in imposing a sentence on the appellant which was manifestly excessive having regard to the facts and circumstances.

Held (dismissing the appeal):

(1) The ingredients required to be proved for the charge against the appellant were as follows: (i) common intention as provided in s. 34 of the Penal Code; (ii) the death of a human being; (iii) that it was caused by the appellant by doing an act with the intention of causing death or of causing bodily injury as is likely to cause death. (para 23)

(2) Common intention can be inferred from the facts and circumstances of the case. Common intention can be formed previously or in the course of occurrence and on a spur of the moment. The trial judge rightly concluded that common intention can be inferred from the facts and circumstances of this case. The joint acts of the appellant and Atip and the other elder brother showed a common intention between them, that developed on the spot, to cause death, or of causing such bodily injury as is likely to cause death to the deceased. (paras 27, 30 & 33)

(3) The appellant, by doing the act of stabbing the deceased, had done so with the intention of causing death or causing such bodily injury as is likely to cause death. The trial judge was correct in finding that all the ingredients of the offence had been proved beyond reasonable doubt and the appellant was called upon to enter his defence. The trial judge was also not wrong in arriving at her decision that the defence had not raised any reasonable doubt on the prosecution's case. (paras 38, 40 & 49)

(4) Although there were some discrepancies in SP4's evidence, they were not material contradictions which were so fatal as to negate SP4's substantive evidence regarding what he saw with his own eyes the role played the appellant in the commission of the offence. The prosecution's failure to call more eye witnesses did not nullify SP4's evidence. SP4's direct evidence has withstood cross-examination and can be believed and accepted. (paras 51 & 57)

(5) There was no miscarriage of justice just because the trial judge took over the hearing at the end of the prosecution's case. The defence should have applied for a trial *de novo* when the trial judge took over, if the defence was not confident that the notes could be understood by the trial judge. However, the defence failed to do that. (paras 61)

(6) Although the trial judge wrote her grounds of judgment two years after making her decision, the trial judge did not wait for two years before making her decision. The trial judge gave her decision 22 days after the close of the case for the defence. There was no miscarriage of justice here. There was no prejudice caused to the appellant as a result of the delay in supplying the grounds of judgment to the appellant. (para 64)

(7) An appellate court does not alter a sentence which is the subject of an appeal because the members of the court might have passed a different sentence. It would have to be shown that the sentence passed by the lower court was so manifestly excessive or inadequate that it could be said that the lower court must have erred in principle that would warrant the intervention of the appellate court. 12 years' imprisonment was reasonable and fair and commensurates with the gravity of the offence. (paras 66 & 71)

Case(s) referred to:
Abdullah Zawawi Omar v. PP [1985] 2 CLJ 2; [1985] CLJ (Rep) 19 SC ***(refd)***
Arulpragasan Sandaraju v. PP [1996] 4 CLJ 597 FC ***(refd)***
Bahruni Ismail v. PP [1997] 3 CLJ 267 FC ***(refd)***
Bhandulananda Jayatilake v. PP [1981] 1 LNS 139 FC ***(refd)***
Dalip Bhagwan Singh v. PP [1997] 4 CLJ 645 FC ***(refd)***
Dharam Pal v. State of UP AIR [1975] SC 1917 ***(refd)***
Hari Ram v. State of Uttar Pradesh [2004] 3 LRI 523 ***(refd)***
Krishna Rao Gurumurthi v. PP and Another Appeal [2009] 2 CLJ 603 FC ***(refd)***
Leong Ka Kong v. PP [1975] 1 LNS 86 HC ***(refd)***
Long Samat & Ors v. PP [1974] 1 LNS 80 FC ***(refd)***
Low Soo Song v. PP [2009] 3 CLJ 309 FC ***(refd)***
Mahbub Shah v. Emperor AIR [1995] PC 118 ***(refd)***
Pandurang AIR [1955] AC 216 ***(refd)***
Pasupathy Kanagasaby v. PP [1994] 1 LNS 112 HC ***(refd)***
PP v. Low Kian Boon & Ors [2006] 3 CLJ 649 HC ***(refd)***
PP v. Mohamed Nor & Ors [1985] 1 LNS 25 SC ***(refd)***
PP v. Teh Cheng Poh [1979] 1 LNS 82 HC ***(refd)***
Ram Tahal v. State of UP AIR [1972] SC 255 ***(refd)***
Sabaruddin Non v. PP & Other Appeals [2005] 1 CLJ 466 CA ***(refd)***
Suresh v. State of Uttar Pradesh AIR [2001] SC 1344 ***(refd)***
Ti Chuee Hiang v. PP [1995] 3 CLJ 1 FC ***(refd)***
Wan Yurilhami Wan Yaacob lwn. PP & Satu Rayuan Lain [2009] 2 CLJ 170 CA ***(refd)***

Legislation referred to:
Criminal Procedure Code, s. 173(f)
Evidence Act 1950, ss. 114(g), 134
Penal Code, ss. 34, 304

Other source(s) referred to:
JK Soonavala, *The Supreme Court (of India) on Criminal Law 1930*, 1960, pp 188 to 193

For the appellant - Ram Karpal; M/s Karpal Singh & Co
For the prosecution - Isa Hj Hassim DPP

Reported by Amutha Suppayah

JUDGMENT

Yeoh Wee Siam JC:

[1] This criminal appeal is in respect of the decision of the learned Sessions Court judge ("the trial judge") regarding Petaling Jaya Sessions Court Arrest Case No. 61-13-1996.

[2] The appellant, Mohd Rafi bin Gulzaman, was charged as follows:

> Bahawa kamu bersama seorang lagi yang masih bebas pada 11.2.1993 jam lebih kurang 7.20 petang, di Kampong Muniandy Bt. 6 1/2, Jalan Klang Lama, dalam Daerah Petaling di dalam Negeri Selangor Darul Ehsan, dengan niat bersama seperti mana yang ditakrifkan di bawah Seksyen 34 Kanun Keseksaan, telah menyebabkan kematian ke atas Kandasamy Naidu a/l V.S. Vengdasamy, No. K/P: 6809594 secara menikam dengan senjata tajam. Dengan ini kamu telah melakukan satu kesalahan yang boleh dihukum di bawah Seksyen 304 Kanun Keseksaan (limb pertama).

[3] The appellant claimed trial after the charge was read to him.

[4] At the close of the case for the prosecution, the trial judge held that the prosecution had proven the case beyond reasonable doubt. The appellant was called to enter his defence, which the appellant duly did, under oath.

[5] At the close of the case for the defence, the trial judge held that the defence had not raised any reasonable doubt on the prosecution's case. The trial judge accordingly found the accused guilty as charged and, after hearing the plea in mitigation, sentenced the accused to 12 years' imprisonment. There is no mention of the imprisonment being effective from the accused's date of arrest on 7 June 1995, therefore, it can be safely understood that such imprisonment was effective from the date of sentence ie, 30 June 2004.

[6] The appellant applied for stay of execution pending his appeal. The trial judge granted bail of RM12,000.

[7] The appellant appealed against the whole decision of the trial judge ie, against the conviction and sentence (see notice of appeal in appeal record pp. 1 and 2).

[8] No appeal regarding sentence was filed by the public prosecutor.

[9] The grounds of appeal are contained in the petition of appeal (see appeal record pp. 4 to 7). However, learned counsel for the appellant has made a summary of the grounds of appeal at pp. 1 and 2 of the appellant's written submissions filed on 24 June 2009 as follows:

(i) The prosecution's sole eye-witness, SP4, was unreliable and wholely unworthly of credit (grounds 1 and 2);

(ii) The learned trial Judge had prejudiced the Appellant by providing her grounds of judgment approximately 2 years after the conclusion of the defence case especially in the light of her hearing the case only from the defence stage (grounds 3 and 4);

(iii) The learned trial Judge misdirected herself seriously in law in failing to properly appreciate the defence of the Appellant (ground 5);

(iv) The learned trial Judge seriously misdirected herself in fact and law in concluding there was evidence of common intention as envisaged under section 304 of the Penal Code (ground 5); and

(v) The learned trial Judge misdirected herself in imposing a sentence on the Appellant which was manifestly excessive having regard to the facts and circumstances (ground 6).

[10] This court would consider all the grounds of appeal raised by the appellant. However, first and foremost, based on grounds (iii) and (iv) above, the main issues which have to be considered are whether the trial judge erred in fact and law:

(1) by calling for the defence at the end of the prosecution's case; and

(2) in finding the accused guilty and convicting him at the end of the case for the defence.

Whether The Prosecution Had Established Its Case Beyond Reasonable Doubt To Justify Calling For The Defence

[11] The facts, as established by the evidence of the prosecution witnesses, are as follows:

[12] On 11 February 1993, at about 7.20pm, SP4 ie, the nephew of the deceased, Kandasamy Naidu a/l VS Vengadasamy ("the deceased"), went to the place of the incident to collect some kutu money from the deceased. The place of incident was a coffee shop near a bridge in Kampung Muniandy, Petaling Jaya. At that time, SP4 saw the deceased quarreling with three men ie, Sabar, Atip and Chandran.

[13] Sabar and Atip are elder brothers of the appellant. SP4 stated that Sabar, Atip and Chandran had brought parangs. So did the deceased.

[14] According to SP4, at the time of the quarrel, SP4 was together with the appellant, having a conversation, on the bridge. SP4 went to the shop and separated the persons who were quarreling and took their parangs and placed them by the side of the shop. After that, SP4 went back to the bridge, and was there with the appellant. Suddenly, SP4 saw the appellant running towards the deceased, punched the deceased and then stabbed the deceased on his back with an object, which was not a knife. At that time, the deceased was talking to the appellant's elder brother, Atip. SP4 saw the deceased falling, and then Atip and another elder brother of the appellant ("the other elder brother") slashing the deceased with a parang.

[15] SP4 stated in his examination-in-chief that the distance between where he was on the bridge and where the deceased was at the place of the incident was about 30 feet. Under cross-examination, at first he stated that such distance was about 15 feet. Later, he stated that it was about 40 feet.

[16] According to SP4, when SP4 was talking to the appellant on the bridge, the appellant did not bring any weapon. The appellant did not talk to his elder brothers. SP4 was not sure with what object the appellant had stabbed the deceased with. SP4 saw the appellant stabbing the deceased once. After being stabbed, the deceased fell, and the appellant's two elder brothers attacked the deceased by slashing him with the parang. One of them was Atip. There were about 60 people in front of the bridge, watching the fight.

[17] When the deceased fell after being stabbed by the appellant, the 3 persons slashed the deceased but the deceased got up and grabbed Atip and pushed Atip against the wall of the bathroom in the shop. After the incident, the persons who slashed the deceased left the place.

[18] SP4 brought the deceased to the University Hospital. After a few minutes, the doctor informed SP4 that the deceased had already passed away at the place of the incident.

[19] According to SP4, he knew that on the same morning of the incident, the deceased had beaten Atip and injured Atip's head but SP4 did not know the reason for it.

[20] The doctor at University Hospital, SP8, testified that he had examined the deceased and confirmed that the deceased had died and he had multiple stab wounds on the body.

[21] The trial judge correctly held that the case occurred before s. 173(f) of the Criminal Procedure Code ("CPC") was amended ie, before 31 January 1997, and therefore the standard of proof required of the prosecution at the close of its case was proof beyond reasonable doubt.

[22] In *Bahruni Ismail v. PP* [1997] 3 CLJ 267 it was stated:

> In all cases before 31 January 1997, the beyond reasonable doubt standard of proof must of necessity apply as all along there can be only one interpretation of s. 180 of the CPC, and that it as decided by the majority decision in Arulpragasan." (see also *Dalip Bhagwan Singh v. Public Prosecutor* [1997] 4 CLJ 645 and *Arulpragasan Sandaraju v. Public Prosecutor* [1996] 4 CLJ 597).

[23] In p. 354 of the appeal record, the trial judge correctly summarised the ingredients that are required to be proved for the charge against the appellant as follows:

(a) common intention as provided in s. 34 of the Penal Code;

(b) the death of a human being;

(c) that it was caused by the appellant by doing an act with the intention of causing death or of causing bodily injury as is likely to cause death.

[24] Regarding common intention, the question is whether the trial judge had misdirected herself in fact and law in concluding that there was evidence of common intention as envisaged under s. 34 of the Penal Code.

[25] Learned counsel for the appellant submitted that evidence of a pre-arranged plan is necessary to attract the application of s. 34 of the Penal Code (see *Mahbub Shah v. Emperor* AIR [1995] PC 118, *Ram Tahal v. State of U.P.* AIR [1972] SC 255, *Dharam Pal v. State of U.P.* AIR 1975 SC [1917] and *Pandurang* AIR [1955] AC 216). He further submitted that there is not an *iota* of evidence in the prosecution's case to suggest that the appellant had shared a "pre-arranged plan or design" with Atip and Chandran in committing the offence.

[26] In law, common intention requires a prior meeting of the minds and presupposes some prior concert. Proof of holding the same intention or of sharing some other intention, is not enough. There must be proved either by direct or circumstantial evidence that there was (a) a common intention to commit the very offence

of which the accused persons are sought to be convicted, and (b) participation in the commission of the intended offence in furtherance of that common intention.

[27] However, I agree with the trial judge that in this case, common intention can be inferred from the facts and circumstances of the case. As submitted by the prosecution before the trial judge, a pre-arranged plan or design between the appellant and the person still at large does not have to be proved by way of direct evidence for every case because "common intention may develop on the spot and without any long interval of time between it and the doing of the act commonly intended" (see pp. 354 and 355 of the appeal record, and *The Supreme Court (of India) on Criminal Law 1930 - 1960* by JK Soonavala at pp. 188 to 193, *PP v. Low Kian Boon & Ors* [2006] 3 CLJ 649 and *Wan Yurilhami Wan Yaacob lwn. PP & Satu Rayuan Lain* [2009] 2 CLJ 170).

[28] Common intention can be formed previously or in the course of occurrence and on a spur of the moment. The existence of a common intention is a question of fact in each case to be proved mainly as a matter of inference from the circumstances of the case (see *Suresh v. State of Uttar Pradesh* AIR [2001] SC 1344, Sethi J speaking for himself and Agrawal J, *Sabaruddin Non v. PP & Other Appeals* [2005] 1 CLJ 466, Court of Appeal, and *Low Soo Song v. PP* [2009] 3 CLJ 309, Federal Court).

[29] Section 34 of the Penal Code is intended to meet a case in which it may be difficult to distinguish between acts of individual members of a party in furtherance of the common intention of all or to prove exactly what part was taken by each of them (see *Hari Ram v. State of Uttar Pradesh* [2004] 3 LRI 523 (SC)). Hence an accused person is made responsible for the ultimate criminal act done by several persons in furtherance of the common intention irrespective of the role he played in the perpetration of the offence (see *Krishna Rao Gurumurthi v. PP and Another Appeal* [2009] 2 CLJ 603, Federal Court).

[30] The trial judge rightly concluded that common intention can be inferred from the facts and circumstances of this case as follows:

[31] According to SP4, on the same morning of the incident, at about 11am, the deceased had quarrelled with Atip. The deceased had accused Atip of stealing the chain of the deceased's wife, and the deceased had hit Atip on the head with a steering lock. Atip and the appellant are brothers. Atip was not satisfied since he was hit by the deceased with the steering lock.

[32] When the deceased and the three men were quarreling, the Appellant, according to SP4, was with SP4. The appellant did not bring any weapon with him at that time, and he did not talk to the three men, two of whom were his elder brothers. However, at the peak of the quarrel, SP4 saw the appellant, running suddenly to the deceased and stabbing him at the back with an object. When the appellant did this, his elder brother, Atip, and the other elder brother then attacked and slashed the deceased.

[33] According to the prosecution witness, SP9, the deceased's body had multiple slash wounds caused by weapons. It is obvious that the deceased would not have suffered such injuries or wounds if not for the stab inflicted by the appellant and the subsequent slashings by Atip and another elder brother. The joint acts of the appellant and Atip and the other elder brother showed a common intention between them, that developed on the spot, to cause death, or of causing such bodily injury as is likely to cause death to the deceased. SP4 testified that he had earlier seen Sabar and Chandran sitting in the coffee shop.

[34] The trial judge therefore rightly concluded that common intention in this case is shown between the appellant and his two elder brothers when the appellant stabbed the deceased from the back, and then Atip and the other elder brother went on to slash the deceased until the deceased fell. Even though SP4 did not see the appellant using a weapon, it cannot be denied that a type of weapon was used to cause the deceased to fall forward. Such common intention happened spontaneously.

[35] I am of the opinion that common intention was proved by the prosecution based on the trial judge's findings as I have restated above.

[36] The second ingredient of the charge ie, the death of the deceased was proved by the evidence of SP4, SP8 and SP9. SP4 was the one who brought the deceased to the University Hospital and was told by the doctor, SP8, that the deceased had already passed away.

[37] The pathologist, SP9, gave evidence on the details of the injuries suffered by the deceased. The injuries have been summarised by the trial judge in pp. 356 and 357 of the appeal record. One of the injuries is a stab wound at the back of the deceased. This, together with all the other stab wounds of the deceased, caused the death of the deceased.

[38] By the fact that the appellant, acting with a common intention with the person still at large, inflicted one of those multiple stab wounds, it proves that the appellant, by doing the act of stabbing the deceased, had done so with the intention of causing death or causing such bodily injury as is likely to cause death.

[39] The evidence of all the other prosecution witnesses are supportive in nature eg, SP1 who made the first information report, SP2 who was the photographer, SP6 who was the investigating officer, and SP10 who was the chemist.

[40] Based on the above, the trial judge is correct in finding that all the ingredients of the offence have been proved beyond reasonable doubt and the appellant was called upon to enter his defence.

Whether The Defence Had Raised Any Reasonable Doubt On The Prosecution's Case To Rebut It

[41] The appellant's defence is as follows:

[42] At about 5pm on the day in question, the appellant was bathing at home. He was informed by his elder sister that his elder brother was having a quarrel at the coffee shop. The appellant went to the coffee shop and saw about 50 people there.

[43] The appellant saw his elder brother, Atip, holding a parang and quarreling with the deceased. Another elder brother of the appellant ie, Sabar was also there. After that, a fight took place between Atip and the deceased. The appellant tried to separate them by holding on to the deceased's hand but failed. The fight escalated; Atip and the deceased exchanged attacks and pointed their parangs against each other. After that, the appellant saw Atip stabbing the deceased at his waist. Atip and the other elder brother then went on to attack and slash the deceased until the deceased fell. The appellant stated that he could not do anything because blood was shooting out from the deceased's body.

[44] According to the appellant, after that Atip and Sabar ran away from the place. The appellant then went home.

[45] The appellant stated that he never saw SP4 at the place of the incident. The appellant also denied stabbing the deceased.

[46] Under cross-examination, the appellant did not deny that he was on the bridge at the time when the deceased and Atip were quarreling. The appellant did run towards the deceased who was

A then pointing his parang towards the direction of Atip. The appellant tried to pull the deceased's left hand down so that the deceased could not attack Atip.

[47] The trial judge formed the conclusion that the appellant did not deny being at the place of the incident. However, the appellant denied stabbing the deceased. The appellant admitted that he did try to restrain the deceased. Therefore, the appellant was actually putting the whole blame and offence on his elder brother, Atip, who according to the appellant, had passed away in 1997. Moreover, as informed by the appellant, the other elder brother ie, Sabar is now missing and cannot be found.

[48] The trial judge found that the appellant's defence is a bare denial in order to absolve himself from the incident. The trial judge therefore held that the defence had not raised any reasonable doubt against the prosecution's case. Accordingly, the trial judge found him guilty as charged and convicted him.

[49] Based on a maximum evaluation of the evidence adduced, I find that the trial judge did not err in her findings. From the recorded testimonies of SP4 and the appellant, I find that the appellant is not a credible witness. It is clear that the appellant was not telling the truth when he initially denied not seeing SP4 at all at the place of the incident. It was only upon cross-examination that he admitted that SP4 was with him on the bridge. This shows that the appellant is capable of not telling the truth on substantive matters. The trial judge was therefore not wrong in arriving at her decision that the defence had not raised any reasonable doubt on the prosecution's case.

[50] The appellant raised the ground (ground (i) above) that the prosecution's sole eye witness, SP4, was unreliable and wholly unworthy of credit. Learned counsel for the appellant submitted that there were material contradictions in SP4's evidence (see pp. 5 to 9 of his written submissions). I also note that during the proceedings before the trial judge, learned counsel for the appellant submitted that SP4 is not a credible witness because SP4 gave different versions of the distance between him and the appellant on the bridge and the place of the incident eg, 30 feet, then 15 feet and finally about 40 feet.

[51] It is true that there are some discrepancies in SP4's evidence. However, I do not think that such discrepancies are material contradictions which are so fatal as to negate SP4's substantive evidence regarding what he saw with his own eyes the role played

by the appellant in the commission of the offence (see also *Long Samat & Ors v. Public Prosecutor* [1974] 1 LNS 80). Regarding the discrepancy in the estimation of distance, for example, what is material is that, in SP4's estimation, the distance was anything between 15 to 40 feet, a distance where, from the bridge, SP4 could still see clearly the fight between the deceased and Atip. It was also at a distance where SP4 could see the appellant running from the bridge to where the deceased and Atip were fighting and where SP4 would also see the appellant stabbing the deceased on the back with an object.

[52] Learned counsel for the appellant also raised the issue that SP4 stated that he did not see the appellant carrying any weapon when the appellant was on the bridge with SP4. That being the case, it is not possible for the appellant to stab the deceased with a weapon.

[53] To me, it is very clear that at the time when SP4 was on the bridge, SP4 did not see the appellant carrying a weapon. Just because SP4 did not see that, it does not mean that the appellant did not have a weapon at the point when he stabbed the deceased on the back. What is material is this, that SP4 did see the appellant running from the bridge to where the deceased and Atip were. SP4 did not know how the appellant suddenly had a weapon or object. That is only within the knowledge of the appellant. The fact remains that SP4 did see the appellant stabbing the deceased at the back with an object. The deceased then fell forward. SP9 confirmed that the deceased had multiple stab wounds on his body, amongst which is a stab wound on the back. This medical finding corroborates SP4's evidence that he saw the appellant stabbing the deceased on the back. The other multiple stab wounds proved that what SP4 stated is correct, that Atip and the other elder brother went on to attack and slash the deceased after the deceased fell from the first stab wound caused by the appellant.

[54] On a balance of probabilities, it is more probable that SP4 was telling the truth and the appellant was not. As the trial judge had found, the defence was a bare denial to protect himself from the consequences of his act. It is hard to believe that the appellant was telling the truth. It is highly improbable for the deceased to fall down forward if not for the stab inflicted on his back by the appellant. Atip was fighting the deceased, facing him. It is therefore highly improbable that Atip or the other elder brother stabbed the

A deceased on the back, when Atip was infront of the deceased and the other elder brother was close by but not behind the deceased, whereas the appellant was behind the deceased.

[55] Learned counsel for the appellant submitted that the
B Prosecution should have called more eye witnesses of the incident, including the coffee shop owner, to prove its case. He cited *Ti Chuee Hiang v. Public Prosecutor* [1995] 3 CLJ 1 where the Federal Court held:

> [1] It is clear law that while the prosecution has a complete discretion
C as to the choice of witnesses to be called at the trial, it also has a duty to call all of the necessary witnesses to establish proof against the accused beyond all reasonable doubt, and if, in the exercise of its discretion, it fails to fulfill this obligation, which is nothing less than a statutory duty, the accused must be acquitted.

D **[56]** He also cited *Abdullah Zawawi Omar v. Public Prosecutor* [1985] 2 CLJ 2; [1985] CLJ (Rep) 19 where the Supreme Court held:

> [3] The practice of making available a witness or witnesses from whom statements have been taken is to prevent the defence from commenting upon the honesty of the prosecution and thus
E invoking the presumption of adverse inference under s. 114(g) of the Evidence Act. But where the prosecution's evidence falls short of proving a *prima facie* case at the end of its case, the right not to call such witness/witnesses and to make him/them available to the defence will be of no avail. If the doubt consists of the gap arising out of the matters adumbrated earlier, the prosecution
F must close this gap. It is not for the defence to call the offered witness/witnesses to supplement the prosecution's case.

[57] In my opinion, the prosecution should have called more than one eye witness of the incident to strengthen its case, and not just
G rely solely on SP4's evidence. However, the prosecution's failure to call more eye witnesses does not nullify SP4's evidence. I do not think that SP4 is an unreliable witness. SP4's direct evidence has withstood cross-examination and can be believed and accepted. It is also corroborated by SP9's evidence on where the stab wounds of the deceased were. Section 134 of the Evidence Act 1950 provides
H that no particular number of witnesses shall in any case be required for the proof of any fact, which means to prove one fact (ie, the appellant stabbed the deceased) it is permitted and sufficient if the prosecution calls 1 witness. The prosecution cannot be faulted if the prosecution, being satisfied that it has called all the witnesses
I necessary for its case, then offered all other relevant witnesses, ie,

13 witnesses altogether, to the defence, but the defence elected not to call such witnesses for the defence, which was exactly what happened in this case. The defence cannot now turn around and contend that s. 114(g) of the Evidence Act 1950 should be invoked against the prosecution for not calling those other witnesses. Where witnesses were freely offered to the defence, and there was no attempt by the prosecution at concealment or any oblique motive on the part of the learned prosecuting officer, the presumption in s. 114(g) of the Evidence Act 1950 cannot arise (see *Public Prosecutor v. Teh Cheng Poh* [1979] 1 LNS 82).

[58] Regarding ground (ii) above, learned counsel for the appellant submitted that the trial judge did not hear the evidence of the prosecution witnesses. The trial judge called for the defence based on the notes of evidence ("the notes") recorded by the previous trial judge.

[59] I note, from the court's records, that the trial judge only started hearing the case from 7 July 2003 onwards after she took over the part-heard case from the previous trial judge. It was then at the stage of submissions, at the close of the case for the prosecution. From then on, the trial judge heard the case to its conclusion and made her decision accordingly.

[60] The ideal situation is for the trial judge to hear all the 12 prosecution's witnesses at first instance. However, after perusing the notes recorded, I am of the opinion that the notes have been carefully recorded in great detail. Any trial judge taking over the part-heard case, or even any appellate judge, would be able to understand the notes and do a maximum evaluation of the evidence in order to arrive at a decision whether the case has been proved beyond reasonable doubt by the prosecution to justify calling for the defence.

[61] I do not think that there is any miscarriage of justice in this case just because the trial judge took over the hearing at the end of the prosecution's case. The defence should have applied for a trial *de novo* when the trial judge took over, if the defence was not confident that the notes could be understood by the trial judge. However, the defence failed to do that. The defence cannot now plead that the trial judge did not have the benefit of hearing the prosecution's case.

[62] It must also be borne in mind that the trial judge heard the whole evidence of the defence case. When the trial judge heard the defence, she also had to evaluate the defence in the light of the prosecution's case to determine whether the defence has raised any reasonable doubt on the prosecution's case. Upon a perusal of the grounds of judgment of the trial judge, I am convinced that the trial judge had done a maximum evaluation of the totality of the evidence before arriving at her decision.

[63] Learned counsel for the appellant also raised the issue that there was a delay in the writing of the grounds of judgment by the trial judge. I note that the appellant was convicted and sentenced on 30 June 2004. According to learned counsel, the grounds of judgment were written approximately two years after the conclusion of the defence case. He submitted that the trial judge only gave her grounds of judgment on 14 May 2006 ie, 10 days before the petition of appeal was filed on 24 May 2006, which was nearly two years after she convicted the appellant on 30 June 2004 (see appeal record pp. 119 and 120, and pp. 11 and 12 of learned counsels' submissions). I have to accept that as the length of delay because I found that the trial judge did not date her grounds of judgment when she appended her signature.

[64] It is very much regretted that there was such inordinate delay by the trial judge to give her grounds of judgment. While this court frowns upon the fact that the trial judge wrote her grounds of judgment two years after making her decision, I also note that at least the trial judge did not wait for two years before making her decision. The trial judge gave her decision on 30 June 2004 ie, 22 days after the close of the case for the defence on 8 June 2004. There was no miscarriage of justice here since the decision was made very soon after the case closed, when everything was still fresh in the mind of the trial judge. The only delay here is purely an administrative delay. As in *Pasupathy Kanagasaby v. PP* [1994] 1 LNS 112, affirmed by the Court of Appeal [2005] 1 CLJ 442, I find that the delay here is of no consequence and does not vitiate the conviction. I am of the opinion that based on the clear notes and records found in the court's file, the trial judge had no difficulty in writing her grounds of judgment. I find that the grounds of judgment of the trial judge, though concise, have dealt with all the substantive issues and cogent evidence of the case. I therefore find that there is no prejudice caused to the appellant as a result of the delay in supplying the grounds of judgment to the appellant.

[65] The appellant's ground of appeal against sentences is that the trial judge had seriously misdirected herself in imposing a sentence on the appellant which is manifestly excessive having regard to the facts and circumstances (see ground (v) above). A

[66] It is trite law that an appellate court does not alter a sentence which is the subject of an appeal because the members of the court might have passed a different sentence. It would have to be shown that the sentence passed by the lower court was so manifestly excessive or inadequate that it could be said that the lower court must have erred in principle that would warrant the intervention of the appellate court. B C

[67] In *Leong Ka Kong v. PP* [1975] 1 LNS 86 Abdul Hamid J (as he then was) stated:

> It is settled law that sentences should not be interfered with by the appellate court merely because the individual presiding in the higher court might, having personal views on the matter, have passed a different sentence. D

[68] In *PP v. Mohamed Nor & Ors* [1985] 1 LNS 25 Abdul Hamid Omar CJ (Malaya) (as he then was) stated: E

> In this regard we would observe that it is the established principle that an appellate court should be slow to interfere with or disturb a sentence passed by the court below unless it is manifestly wrong in the sense of being illegal or of being unsuitable to the proved facts and circumstances ... And the mere fact that another court might pass a different sentence provides no reason for the appellate court to interfere if the court below applies the correct principles in the assessment of the sentence. F

[69] In *Bhandulananda Jayatilake v. PP* [1981] 1 LNS 139, Raja Azlan Shah, acting LP (as HRH then was) stated: G

> Is the sentence harsh and manifestly excessive? We would paraphrase it in this way. As this is an appeal against the exercise by the learned judge of a discretion vested in him, is the sentence so far outside the normal discretionary limits as to enable this court to say that its imposition must have involved an error of law of some description? I have had occasion to say elsewhere, that the very concept of judicial discretion involves a right to choose between more than one possible course of action upon which there is room for reasonable people to hold differing opinions as to which is to be preferred. That is quite inevitable. Human nature being what it is, different judges applying the same principles at the same time in the same country to similar facts H I

A may sometimes reach different conclusions (see *Jamieson v. Jamieson* [1952] AC 525, 549). It is for that reason that some very conscientious judges have thought it their duty to visit particular crimes with exemplary sentences; whilst others equally conscientious have thought it their duty to view the same crimes with leniency. Therefore sentences do vary in apparently similar circumstances with the habit of mind of
B the particular judge. It is for that reason also that this court has said it again and again that it will not normally interfere with sentences, and the possibility or even the probability, that another court would have imposed a different sentence is not sufficient, *per se*, to warrant this court's interference. (see also *PP v. Mohd Romzan Ramli* [2008] 8 CLJ
C 128 at p. 133).

[70] The records show that the trial judge recorded the appellant's plea in mitigation before passing the sentence. The appellant was 34 years old, married and has two children. He worked as a parking attendant before the incident. The appellant prayed for the lightest
D sentence possible.

[71] Regarding the sentence imposed by the trial judge, I am of the opinion that 12 years imprisonment is reasonable and fair and commensurates with the gravity of the offence. It is not manifestly excessive. The maximum penalty under s. 304 of the Penal Code
E (first limb) is imprisonment which may extend to 30 years.

[72] Bearing in mind that the deceased has lost his life from the intentional causing of bodily injury by the appellant, 12 years' imprisonment is the appropriate sentence to be meted out. The
F appellant might be trying to protect his brother, Atip, in the incident. However, it must be stressed here that the quarrel or fight was not between the appellant and the deceased, but between the appellant's elder brothers and the deceased. What the appellant did was totally out of proportion to the situation, and beyond reason,
G considering that the deceased was no threat at all to the appellant.

[73] There was therefore no good reason why this court should interfere with the sentence imposed by the trial judge.

[74] Based on the above I dismissed the appeal of the appellant on
H 4 September 2009. The sentence of 12 years' imprisonment was confirmed.

[75] Learned counsel for the appellant applied for stay of execution pending an appeal to be made to the Court of Appeal. I allowed a stay of execution and granted a cash bail of RM30,000 in one
I surety.